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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-192511

DATE: February 5, 1979

MATTER OF: [Advances of Severance Pay to Foreign Service
Local Employees of United States in Colombia]

DIGEST: Secretary of State is authorized to fix compensation of alien employees, based on prevailing wage rates and compensation practices for positions in the locality, to the extent consistent with the public interest. 22 U.S.C. § 889(a). Colombian law requires employers to provide severance pay and permits employees to receive their severance pay in advance of severance, paying interest on the advance. Adoption of this local practice by State Department does not violate statutory provision against advance payments (31 U.S.C. § 529) or statute governing recording of obligations (31 U.S.C. § 200).

This responds to a request from the Office of the Legal Adviser, Department of State (Department) for an opinion on whether the Department has authority to provide severance pay in advance to alien employees (foreign service locals (FSLs)) of the United States Embassy in Colombia in accordance with local practice, notwithstanding certain restrictions on advance payments in title 31 of the United States Code. For reasons set forth below, we conclude that such advances of severance pay may be provided to FSLs in Colombia prior to their separation from Government service, in accordance with local practice.

The Department appoints FSLs at posts abroad pursuant to 22 U.S.C. § 946 (1976). Subsection 889(a)(1), title 22, authorizes the Secretary to establish compensation plans for alien employees as follows:

"The Secretary shall, in accordance with such regulations as he may prescribe, establish compensation plans for alien employees of the Service: Provided, That such compensation plans shall be based upon prevailing wage rates and compensation practices for corresponding types of positions in the locality, to the extent consistent with the public interest."

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Colombian law requires that employers provide employees with severance pay which is accrued at the rate of one month's pay for each year of service plus 12 percent annual interest. Article 249, Colombian Labor Code (1978). Additionally, the law provides for the advance payment of accrued severance pay for the following purposes:

1. to purchase a home;
2. to pay a mortgage thereon; or
3. to make improvements on a home previously purchased.
(Article 256, Id.)

Under regulations issued pursuant to 22 U.S.C. § 889 (Uniform State/AID/USIA Regulations 3 FAM 934.3-3), and consistent with the prevailing employment practice in Colombia, as set forth above, a Severance Payment Plan was established by the Department for eligible Colombian employees of all U.S. Government agencies in Colombia. (Attachment D, Local Compensation Plan, February 12, 1978).

The plan provides as follows:

"Employees will become eligible for severance pay after one month service. Eligible employees are entitled to one month salary for each year of service and, proportionally for any fraction of a year. Payment will be computed only for completed months. Service prior to January 1, 1963 will be computed on base pay in increments of three years. Service subsequent to January 1, 1963 on the basis of the base pay at the time of termination.

"Severance payment will be computed on the basis of the employee's base salary at the time of separation. All employees paid under the terms of Joint Local Compensation Plan are eligible for Severance Payment, except if terminated:

- "a) For cause of misconduct or malfeasance as determined by employing agency.
- "b) For cause of willfully committing material damage to his office or building, machinery, materials, instruments and other objects connected with his work.

"c) For cause of security when employing agency determines that termination is necessary and advisable in the interest of the national security of the United States."

However, the Department's plan, unlike the Colombian Labor Code, does not provide for the advance payment of severance pay.

While the Department believes that the advance payment of severance pay would be in the interest of the United States Government, it is not sure that certain provisions in title 31, United States Code do not proscribe the proposed payments. Specifically, the questions raised are as follows:

"1. Would adoption of the proposal violate 31 U.S.C. § 529 [1976] which generally prohibits the advancement of public monies? * * *

"2. Would the adoption of the proposal violate 31 U.S.C. § 200 [1976], which in essence requires that obligations for a given fiscal year pertain to that fiscal year? * * *

"3. Is there any other legal basis which would preclude the adoption of the proposal?"

An obligation should be recorded when a definite commitment has been made or a legal liability has been incurred to make payment from an appropriation. 38 Comp. Gen. 81 (1958); 34 Comp. Gen. 418 (1955). Under section 1311(a) of the Supplemental Appropriation Act, 1955, 31 U.S.C. § 200(a) (1976), no amount may be recorded as an obligation of the Government unless it is supported by documentary evidence of--

"(1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed; or

* * * * *

"(7) employment or services of persons or expenses of travel in accord with law, and services performed by public utilities; or

"(8) any other legal liability of the United States against an appropriation or fund legally available therefor."

In this case, the Government's liability under the Department's Severance Pay Plan arises when an employee becomes eligible for severance pay after completing one month's service. At that point, the employee's entitlement to one month's salary for each year of service completed (and proportionately for any fraction of a year) begins.

The employee's employment record would satisfy the requirement of section 1311 for documentary evidence of a "legal liability of the United States against an appropriation." Therefore, severance pay should be recorded as an obligation against the fiscal year appropriation current at the time of accrual.

This conclusion is in accord with our Report "Substantial Understatement of Obligations for Separation Allowances for Foreign National Employees," B-179343, October 21, 1974. In that report, we stated that:

"Recording obligations for separation allowances at the time the allowances are paid rather than incurred results in understatement of the obligations and inadequate administrative control of funds.

"To insure adequate administrative control of funds and to charge the period benefiting from the services rendered by foreign national employees, the current appropriation should be obligated for the full amount of the liability for separation allowances which accrues during the year."


Apparently, the practice of the Department is consistent with this requirement; the Department's letter refers to "the continuous setting aside of accrued severance pay benefits by the embassy." Payment, in advance of separation, of accrued severance pay does not violate the provisions of 31 U.S.C. § 200, provided the obligation is supported by documentary evidence such as the employee's employment or pay record and that funds of the fiscal year in which the liability to the employee accrues are obligated and expended for this purpose.

There is no violation of the statutory provision prohibiting advance payments, 31 U.S.C. § 529, if an advance of severance pay is made, pursuant to the prevailing Colombian practice, before the employee's separation from Government service. The kinds of advances prohibited by 31 U.S.C. § 529 are, generally, payments before goods or services to which they relate have been delivered or performed. Here the services which entitle the FSLs to the advances of severance pay, under prevailing local practice, will have been performed when the payments are made.

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Even if payments of severance pay prior to severance were considered advance payments, such payments would not be prohibited by 31 U.S.C. § 529, which allows advance payments if authorized by "other law". 22 U.S.C. § 889(a)(1), by allowing payments to alien employees under prevailing local practice, in effect authorizes advance payments if they are the prevailing practice.

Additionally, we are aware of no other legal requirements which would preclude the payment of severance pay in the circumstances here present. Accordingly, in view of the statutory provision which authorizes the Secretary to establish compensation plans for alien employees "based upon prevailing * * * compensation practices * * * to the extent consistent with the public interest," 22 U.S.C. § 889(a)(1), and the determination by the State Department that payments of severance pay prior to severance are the prevailing practice in Colombia and are in the public interest, such payments may be made to FSLs in Colombia.


Deputy Comptroller General
of the United States